IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 706

CITY OF CHICAGO, A MUNICIPAL CORPORATION, BOARD OF HEALTH OF THE CITY OF CHICAGO, DR. ROBERT A. BLACK, HEALTH COMMISSIONER AND ACTING PRESIDENT OF BOARD OF HEALTH OF THE CITY OF CHICAGO,

Petitioners,

vs.

FIELDCREST DAIRIES, INC.,

Respondent.

BRIEF OF AMICUS CURIAE, THE STATE OF ILLINOIS.

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THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO 56

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BRIEF OF AMICUS CURIAE, THE STATE OF ILLINOIS.

STATEMENT.

The STATE OF ILLINOIS, by GEORGE F. BARRETT, Attorney General, appears as *amicus curiae* pursuant to Paragraph 9 of Rule 27 of this Court. The law of Illinois relating to the powers and duties of the Attorney General in the premises is stated in the case of the *People ex rel. George F. Barrett, Attorney General, Petitioner,* v. *Philip J. Finnegan, Judge of the Circuit Court of Cook County, Respondent,* (1941) 378 Ill. 387, as follows:

"The office of Attorney General, as it existed at the common law, is one of ancient origin. He was the

only law officer of the Crown. (4 Reeves Hist. Eng. Law, chap. 25, p. 122.) The prerogatives which pertained to the Crown of England under the common law, in this country are vested in the people and the necessity for the existence of a public officer charged with the protection of public rights and the enforcement of public duties, by proper proceedings in the courts of justice, is just as imperative here as there.

"In this State the constitution, by creating the office of Attorney General under its well-known common law designation and providing that he shall perform such duties as may be prescribed by law, ingrafted upon the office all the powers and duties of an Attorney General as known at the common law, and gave the General Assembly power to confer additional powers and impose additional duties upon him. The legislature cannot, however, strip him of any of his common law powers and duties as the legal representative of the State. (*Fergus* v. *Russel*, 270 Ill. 304.) * * * As chief law officer of the State he may exercise all such power and authority as public interest may from time to time require. He may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order and the protection of public rights. (*Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714.)"

The reason for appearance of *amicus curiae* is to invite the Court's attention to the fact that the issues presented by the parties to this cause involve an important public question that affects the public interests of the People of the State of Illinois, and to request that the Court abstain from any action in this cause which may impinge the authority of the State by limiting the general application throughout the State of an Act of the General Assembly.

ARGUMENT.

It is our position that the question presented is whether the City has the power, under the statutes in question, to outlaw that which the State has legalized. We say this is the controlling question in this case; that the principles decisive of the question are settled in Illinois; and that the question is one of local law. Should the City's contention in this regard be sustained, the effect would be to impinge the power of the State and limit the application of an Act of the General Assembly by preventing its operation within the territory of the City which is within the territorial jurisdiction of the State.

The City contends that by virtue of Article 5 of the Illinois Cities and Villages Act, the pertinent provisions of which are set forth in Petitioner's Brief at p. 13, it has authority to prohibit, by ordinance, the use of single service milk containers in the sale and distribution of pasteurized milk within the City; and that this power was not affected by any of the provisions of the "Illinois Milk Pasteurization Plant Law" of 1939, which statute is set forth in full at p. 80 *et seq.* of Petitioners' Brief as Appendix "A".

For the purpose of this argument, we shall assume that the term "standard milk bottle" as used in the ordinance means what the Master said it did, viz.: "a glass bottle of the type, shape and proportions well-known to the trade and the community in Chicago as having been used for many years for the delivery of milk at retail." It is conceded for the purpose of this argument that the City had the power by virtue of the general provisions above noted, which are contained in Article 5 of the Cities and Villages Act of Illinois to prohibit the use of single service milk

containers in the sale and distribution of pasteurized milk in the City of Chicago, prior to the adoption of the "Illinois Milk Pasteurization Plant Law", and the specific approval, by the Director of the Department of Public Health of the State, of a pasteurization plant and single service containers used and filled therein.

An examination of the provisions of the "Illinois Milk Pasteurization Plant Law" of 1939 will show that the State has recalled certain of the powers theretofore conferred upon cities by the provisions of Article 5 of the Cities and Villages Act with reference to regulating the pasteurization of milk and the packaging, sale and distribution of pasteurized milk. The Act of 1939 requires that any person operating a pasteurization plant who distributes, delivers or sells pasteurized milk, or pasteurized milk products for consumption in the State of Illinois shall annually make application to the Department for a Certificate of Approval. Section 3 of the Act provides,

> "Any person who is hereafter engaged in operating a pasteurization plant for the purposes of distributing, delivering, or selling pasteurized milk or pasteurized milk products for consumption in the State of Illinois shall before engaging in such business make application to the Department for a Certificate of Approval."

Section 4 requires that upon receipt of such application, the Department shall make an inspection of the pasteurization plant, and, in the event the plant, equipment and methods of operation are found to comply with the provisions of the Act, the Director shall issue a Certificate of Approval upon payment of the required fee as is in the Act provided. Section 6 provides that any person operating a pasteurization plant shall, at any time, allow the Department to inspect such plant and take such samples as may be deemed necessary by the Department. Section 7 provides for the labeling of all "bottles, cans, packages and other containers enclosing milk or any milk product

defined in this Act." Section 8 requires that all pasteurized milk and milk products shall be placed in their final milk containers at the plant in which they are pasteurized and makes it unlawful for hotels, soda fountains, restaurants, grocery stores, milk depots, milk stations and similar establishments to sell or serve any pasteurized milk or milk products except in the original container in which it was placed at the point of pasteurization, provided that this requirement shall not apply to milk or milk products consumed on the premises, which may be served from the original container or from a dispenser approved by the Department for such purpose. This Section also prohibits the sale or distribution of bulk, loose or dipped pasteurized milk even though it has been heated as required by the Act.

This much of the Act makes it apparent that the Legislature intended to provide a law investing the State Department of Public Health with the power and duty to regulate the pasteurization of milk and milk products and the packaging, distributing and selling of pasteurized milk products. The statute authorizes the Department to inspect not only the pasteurization plant but also the *equipment and methods of operation.* With respect to "methods of operation", the statute provides that all pasteurized milk or milk products shall be placed in their final delivery container in the plant in which they are pasteurized. The Section so providing makes it unlawful for hotels and similar establishments as well as grocery stores and other retail distributing establishments to sell or serve any pasteurized milk or milk products except in the original container in which it was placed at the point of pasteurization. How could the Legislature any more clearly evidence an intent that milk which is pasteurized in a pasteurization plant approved by the State Department of Public Health, placed in containers in said plant, which containers are approved by the Department of Public Health, and which

must be sold in said original containers, may be sold in said containers at any place in the State of Illinois?

Item 10 of Section 15 of the Act provides in part,

> "Single service containers, caps, gaskets and similar articles shall be manufactured and transported in a sanitary manner."

Item 18 of the same Section provides:

> "Bottling or packaging of milk and milk products shall be done at the place of pasteurization by approved mechanical equipment."

It thus appears that the Legislature intended that the Department of Health of the State of Illinois would have the power to approve the use of single service containers that conformed with the requirements of the Act. In short the policy of the legislature as expressed in the entire Act is to legalize the distribution and sale of pasteurized milk in single service containers for consumption in the State of Illinois, and not merely in the part of the State of Illinois lying outside of the City of Chicago, provided the milk is pasteurized and packaged in a plant and in containers approved and licensed by the Depagtment of Public Health.

As was stated in the opinion of the Circuit Court of Appeals in this case:

> "The authorities are uniform that any ordinance which conflicts with any statute or public policy adopted by the State Legislature is invalid. The rule is aptly stated in 2 McQuillin on Municipal Corporations, 572:
>
> > 'A municipal corporation cannot, without special authority prohibit what the policy of a general statute permits. Nor, on the other hand, can an ordinance permit that which the State's policy forbids. Consequently under a general grant of power, a Municipal Corporation cannot adopt ordinances "which infringe the spirit, or are repugnant to the policy of the State as declared in its legislation." It thus follows that if the State

> has expressed through legislation a public policy with reference to a subject, a municipality cannot ordain in respect to the subject to an effect contrary to, or in qualification of the public policy so established. * * *"

"Such rule has been recognized by the Illinois courts. *City of Chicago* v. *Union Ice Cream Mfg. Co.*, 252 Ill. 311; 315; *City of Chicago* v. *Drogasawacz*, 256 Ill. 34, 37; *City of Mirango* v. *Roland*, 263 Ill. 531, 534. In the *Marengo* case, the Court said:

> 'Municipal authorities, under a general grant of power, cannot adopt ordinances which infringe the spirit of a State law or are repugnant of the general policy of the State. * * *'"

Section 19 of the Act of 1939 provides:

> "Nothing in this act shall impair or abridge the power of any city, village or incorporated town to regulate the handling, processing, labeling, sale or distribution of pasteurized milk, and pasteurized milk products, provided such regulation not permit any person to violate the provisions of this act."

It is submitted there is nothing in this section that might properly be interpreted as authorizing the city to outlaw the containers that the State has legalized for use within the state, in accordance with the express provisions of the Act.

At the trial it was stipulated (R. 695-6) that if S. V. Layson were called as a witness and duly sworn and testified in this cause, he would testify as follows:

> "That he is Milk Sanitarian of the Department of Public Health of the State of Illinois with offices at Springfield, Illinois; that the Department of Public Health of the State of Illinois by or under the direction of the affiant has made an inspection of the plant of Fieldcrest Dairies, Inc., located in the village of Chemung, McHenry County, Illinois, approximately 76 miles from the City of Chicago, Illinois, and that said plant and its equipment and apparatus have been approved by the Department of Health of the State of Illinois as complying with the laws and regulations

of said state pertaining to milk plants selling liquid milk and cream to the public at wholesale and retail; that on or about November 17, 1938, the Department of Public Health of the State of Illinois issued its Certificate No. 395 for the calendar years 1938, and on or about January 18, 1939, issued its Certificate No. 59 for the calendar year 1939, which latter certificate, duly sealed with the seal of the Department of Public Health of the State of Illinois and signed by A. C. Baxter, Acting Director of Public Health of the State of Illinois, is now in full force and effect, and that the language of said certificate last mentioned is substantially as follows:

> 'The State Department of Public Health considers that the construction and equipment of the pasteurization plant is such that with proper maintenance and operation, the pasteurized milk or milk products will be safe for human consumption. The continued safety of the pasteurized milk or milk products depends upon the continuous proper maintenance and operation of the plant, the responsibility for which rests with the management of said plant.'

> "That the Department of Public Health of the State of Illinois, in reliance upon tests made by the Department of Dairy Husbandry of the University of Illinois by or under the direction of Dr. M. J. Prucha, which tests have been accepted and relied upon by the said Department of Health, has approved the paper 'Pure-Pak' container for the sale of liquid milk and milk products to the public in the State of Illinois; that the Department of Public Health of the State of Illinois has inspected the pasteurization plant and also the Ex-Cell-O 'Pure-Pak' machine located in the plant of the Fielderest Dairy at Chemung, Illinois, and has approved the same."

It thus appears as a fact that the single service milk containers in question, as well as the plant and method of operation, etc. that are involved in the question, were approved and licensed by the State Department of Public Health under the authority of the Statute.

Counsel for Petitioners rely upon the case of *City of Geneseo* v. *Illinois Northern Utilities Company*, 378 Ill. 506. They claim that this case is decisive of the question here presented, but their claim is not supported by the case. In that case the claim was made that the Public Utilities Act of Illinois had the effect of recalling from Municipal Corporations within the State the power granted under Article 5 of the Cities and Villages Act to "regulate the locating, constructing or laying a track * * * in any street, alley or public place." The Court in that opinion held that the Public Utilities Act gave to the Commerce Commission of Illinois general supervision over utilities but that this grant of power did not affect the power of the City to control the occupancy of its streets. The power of the Commerce Commission to regulate utilities is separate and distinct from the power of cities to control the occupancy of their streets and the decision in that case has no application to the question here presented.

Another case relied upon by the City of Chicago is the case of *City of Ottawa* v. *Brown*, 372 Ill. 468. In that case the Legislature adopted, "An Act to regulate the storage, transportation, sale and use of gasoline and volatile oils," which became effective July 1, 1919. The Act contained the following provision, "Except in cities or villages where regulatory ordinances upon the subject are in full force and effect, the Department of Trade and Commerce shall have power to make and adopt reasonable rules and regulations governing the keeping, storage, transportation, selling or use of gasoline and volatile oil." When this statute took effect, the City had in force an ordinance regulating the storage of gasoline, which ordinance was adopted pursuant to the powers granted by Article 5 of the Cities and Villages Act. The Court held that the City had sufficiently exercised the power granted by the general statute to enable it either to amend its ordinance or to adopt a

broader one. The decision of the Court in this case has no bearing on the question here presented.

For the reasons stated, we respectfully submit that a decision sustaining the contention of the City of Chicago would be contrary to the law of the State of Illinois and would limit the general application throughout the State of an Act of the General Assembly.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 706.—October Term, 1941.

City of Chicago, A Municipal Corporation, Board of Health of the City of Chicago, et al., Petitioners,
vs.
Fieldcrest Dairies, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 27, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent, a Michigan corporation authorized to do business in Illinois, sells milk to wholesalers and retailers in various cities in the vicinity of Chicago. By an ordinance passed on January 4, 1935, the City of Chicago required that milk or milk products "sold in quantities of less than one gallon shall be delivered in standard milk bottles." § 3094. Respondent sought a permit from petitioner Board of Health to sell milk in "Pure-Pak" paper containers in that city. That permit was not granted. Thereafter respondent filed suit against petitioners in the United States District Court for the Northern District of Illinois alleging, *inter alia*, that its "single service, sterile, sanitary and non-absorbent" containers are "standard milk bottles" within the meaning of the Chicago ordinance; that if the ordinance is construed as prohibiting respondent from using its paper containers the ordinance is unconstitutional and invalid under the federal and state constitutions; and that the refusal of the permit has and will cause respondent irreparable damage. The complaint prayed for a declaratory judgment that the ordinance be construed so as not to prohibit respondent from using its containers or, in the alternative, that the ordinance insofar as it does prevent such use is unconstitutional and invalid. Issue was joined. In May, 1939, the District Court referred the cause to a master who held extended hearings. In July, 1939, the so-called Illinois Milk Pasteurization Plant Law (L. 1939, pp. 660-666; Rev. Stat. 1941, c. 56½, §§ 115-134) was enacted, containing certain provisions regulating the use of single service and paper containers (§ 15) and reserving to cities, villages and incorporated

towns the power to regulate the distribution, etc. "of pasteurized milk and pasteurized milk products, provided that such regulation not permit any person to violate any provisions of this Act." § 19. On April 27, 1940, the master submitted his report finding that respondent's paper containers were not "standard milk bottles" within the meaning of the ordinance and that the ordinance as construed was valid and constitutional. In October, 1940, the District Court, on exceptions to the master's report, held that respondent's containers were "standard milk bottles" within the meaning of the ordinance. And it went on to hold that under the Milk Pasteurization Plant Law the city was without power to prohibit the use of such containers. It entered a decree in accordance with that finding and enjoined petitioners from interfering with respondent in the sale and delivery of milk and milk products in those containers. 35 F. Supp. 451. On appeal to the Circuit Court of Appeals, that court held that the District Court erred in holding that respondent's containers were "standard milk bottles" within the meaning of the ordinance. But it concluded that the ordinance insofar as it prohibited, rather than regulated, the use of paper containers was invalid by reason of the state Act. And it went on to intimate by way of *obiter dictum* that if the ordinance were construed to prohibit the use of respondent's containers it would not survive as a constitutional exercise of the police power. 122 F. 2d 132.

On May 15, 1940, while the cause was pending before the District Court, Dean Milk Company, of which respondent is a wholly owned subsidiary, instituted an action in the Illinois state court against petitioners and other city officials raising substantially the same issues and seeking substantially the same relief as respondent raised and sought in the federal court. After judgment had been rendered by the District Court in this case and while the appeal was pending, Dean Milk Company moved in the state court for a decree granting the relief prayed for and retaining jurisdiction by the state court pending final determination of the appeal in this case. Such a decree was entered by the state court in December 1940.

We granted the petition for certiorari because of the doubtful propriety of the District Court and of the Circuit Court of Appeals in undertaking to decide such an important question of Illinois law instead of remitting the parties to the state courts for

litigation of the state questions involved in the case. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496.

We are of the opinion that the procedure which we followed in the *Pullman* case should be followed here. Illinois has the final say as to the meaning of the ordinance in question. It also has the final word on the alleged conflict between the ordinance and the state Act. The determination which the District Court, the Circuit Court of Appeals or we might make could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois. Here as in the *Pullman* case "a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." 312 U. S. p. 500. Furthermore, the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State. Though that issue was not in the case when the complaint was filed, it emerged, due to the passage of the Milk Pasteurization Plant Law, long before the District Court entered its decree. The delicacy of that issue and an appropriate regard "for the rightful independence of state governments" (*Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 50) reemphasize that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals. As we said in the *Pullman* case, "The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision" and any "needless friction with state policies." See p. 500 and cases cited; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483-484. It is an exercise of a "sound discretion, which guides the determination of courts of equity". *Beal* v. *Missouri Pacific R. Co.*, *supra*, p. 50. In this case that discretion calls for a remission of the parties to the state courts which alone can give a definitive answer to the major questions posed. Plainly they constitute the more appropriate forum for the trial of those issues. See 54 Harv. L. Rev. 1379. Considerations of delay, inconvenience, and cost to the parties, which have been urged upon us, do not call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole.

The desirability of the course which we have suggested is not embarrassed by any question as to whether ready recourse may

be had to the state courts. The availability of the state tribunal is obvious, since a case involving substantially identical issues and brought by respondent's parent corporation is pending in the state court. Cf. *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159.

It is of course true that respondent sought to raise in its complaint a constitutional issue—an issue which lurks in the case even though it not be deemed substantial. But here, as in the *Pullman* case, that issue may not survive the litigation in the state courts. If it does not, the litigation is at an end. That again indicates the wisdom of allowing the local law issues first to be resolved by those who have the final say. Avoidance of constitutional adjudications where not absolutely necessary is part of the wisdom of the doctrine of the *Pullman* case.

We therefore vacate the judgment and remand the cause to the District Court with directions to retain the bill pending a determination of proceedings in the state court in conformity with this opinion.

It is so ordered.

Mr. Justice ROBERTS concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.